No. 11020.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALLEN I. DUNN,

Appellant,

vs.

CEDAR RAPIDS ENGINEERING COMPANY OF DELAWARE, a corporation, and CEDAR RAPIDS ENGINEERING COMPANY, a corporation,

Appellees.

REPLY TO PETITION FOR REHEARING.

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Introduction.

The appellant in the above entitled action has filed a petition for rehearing. The basis for the petition seems to be that under Article XII, Section 15, of the California Constitution it would be unconstitutional for a federal district court sitting in California to refuse to accept jurisdiction in this case.

The appellant lays great stress upon the fact that he is a citizen of California.

It should be recalled that all matters relating to the action in the case at bar took place in Iowa—the appellant was a resident of Iowa at the time he entered into the contract [Tr. p. 3]; the contract was executed and to be performed in Iowa [Tr. pp. 3, 22, 26]; the appellees had

their offices and principal places of business in Iowa [Tr. pp. 2-3]; and neither of the appellees was ever a resident of California.

Under this state of facts the appellant then moved from Iowa to California and brought his action here wherein the sole basis for the claim of jurisdiction was the service of process upon a *statutory* agent.

I.

Article XII, Section 15, of the California Constitution Is Inapplicable to the Facts in the Case at Bar.

The appellant argues for the first time in his petition for rehearing that to refuse to extend the scope of Sections 405 and 406(a) of the California Civil Code so as to require the exercise of jurisdiction in the case at bar would be to place an unconstitutional interpretation upon these sections by virtue of the provisions of Article XII, Section 15, of the California Constitution.

As was said in *Mann v. Brison,* 120 Cal. App. 450, 452-453 (Hearing denied, 1932):

> "In denying a rehearing in this case it is proper to note the fact that the point and argument supporting it to the effect that the charter provision involved is unconstitutional is made for the first time in the petition for rehearing. It has been repeatedly stated that a rehearing will not be granted for the purpose of considering suggestions made under such circumstances. (*In re Novotny's Estate,* 94 Cal. App. 782-790 [271 Pac. 923, 273 Pac. 58]; *Pasadena Ice Co. v. Reeder,* 206 Cal. 697-705 [275 Pac. 944, 276 Pac. 995], and *People v. New York Indemnity Co.,* 113 Cal. App. 487 [298 Pac. 849].)"

To the same effect, see:

Hull v. Burr, 207 Fed. 543, 544 (C. C. A. 1st, 1913).

Even if appellant had made timely issue of this point, it would have availed him nothing.

Article XII, Section 15, of the California Constitution provides:

> "No corporation organized outside the limits of this State *shall be allowed to transact business within this State* on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this State." (Italics added.)

A mere reading of this provision reveals that it refers only to transacting "business within this State," that is, the State of California. The contracts sought to be rescinded here were made, executed and to be performed in Iowa and are, therefore, not "business within this State," and Article XII, Section 15, is inapplicable by its own terms.

This section is likewise inapplicable because it merely provides a prohibition against legislation allowing a foreign corporation to transact business *within this state* on more favorable conditions than a domestic corporation. Sections 405 and 406(a) of the California Civil Code are not such legislation. Those sections relate only to the manner of maintaining a lawsuit against a foreign corporation, and it is clearly established California law that the maintenance of a lawsuit is not the transaction of "business within this state."

As the court said in *Indian Refining Company, Inc. v. Royal Oil Company, Inc.*, 102 Cal. App. 710, 713-714, 283 Pac. 856 (1929):

> "Appellants first insist that the bringing of this action, in itself, constituted doing business in this state, within the meaning of the statutes governing this case. (Stats. 1923, p. 1037.) We think that this contention cannot be upheld. (*General Conference of Free Baptists v. Berkey,* 156 Cal. 466 [105 Pac. 411].) Where a foreign corporation has complied with the provisions of law enabling it to do business in this state, and has subsequently withdrawn from such intrastate business, and filed the certificate thereof in the proper manner, there is nothing in our law to prevent it from subsequently maintaining an action to collect an account that arose while it was lawfully doing business in this state, and *the filing of such an action does not constitute doing business within the meaning of the statute.*" (Italics added.)

Manifestly, the appellant cannot rely upon this Constitutional provision, since he has not made timely issue of this point; and even if he had, the section is inapplicable in the case at bar.

II.

Stafford v. Groff Is Inapplicable to the Facts in the Case at Bar.

A full discussion of *Stafford v. Groff* cited at page 4 of the appellant's petition for rehearing would be of little help to the court in the case at bar.

The record in that case clearly shows that the cause of action arose in California, and the subject matter of the controversy had its locus in California.

The quitclaim deed which was allegedly procured by fraud was executed in California (*Stafford v. Groff,* No. 2 Civ. 15218 [Clk. Tr. p. 60, lines 13-20]), and the plaintiffs' property which was allegedly damaged had its locus in California (*Stafford v. Groff,* No. 2 Civ. 15218 [Clk. Tr. p. 59, lines 13-20].)

Thus the *Stafford* case is similar to *Neirbo v. Bethlehem Shipbuilding Co.,* 308 U. S. 165, 60 S. Ct. 153, 84 L. ed. 167 (1939), and *Norrie v. Kansas City So. Ry. Co.,* 7 F. (2d) 158 (D. Ct., S. D. N. Y., 1925) relied upon by the appellant on the first hearing of this case and held by this court not to be in point.

III.

The Case of Miner v. United Air Lines Transport Corp. Is Controlling in the Case at Bar.

The clear federal policy of refusing to extend the exercise of jurisdiction to transactions occurring outside California where the language of the California statute providing for appointment of agents for service of process does not clearly manifest the intention of the state to assume jurisdiction in such matters, and there has been no decision by the state courts expressing such intention, is set forth in *Miner v. United Air Lines Transport Corp.*, 16 F. Supp. 930, 931 (D. Ct., S. D. Calif., 1936).

Accord:

Steinberg v. Aetna Fire Ins. Co., 50 F. Supp. 438 (D. Ct., E. D. Penn., 1943);

Moore v. National Hotel Management Corp., 21 F. Supp. 177 (D. Ct., N. D. Tex., 1937).

The *Miner* case (*supra*) was decided almost ten years ago. The California legislature has met many times since this decision and has not amended the statute so as to include within its operation suits founded upon causes of action arising out of business done by a foreign corporation outside this state.

This court therefore correctly held that it does not appear that authorization for California State courts to entertain the instant action can be read into the statute by a United States Circuit Court.

Wherefore, it is respectfully submitted that the petition for rehearing should be denied.

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